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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
Petition for Rulemaking to Amend)
Sections 73.646, 73.293, 73.295,)
et al. of the Commission's Rules)
to Provide for Auctions of Rights) File No. _____
to Provide Services on Vertical)
Blanking Intervals and FM Subcarrier)
Frequencies)

PETITION FOR RULEMAKING

Pursuant to Section 1.401 of the Commission's Rules, by its attorney, Interactive Communications Partners hereby petitions the Commission to initiate a rulemaking to adopt rules for the auctioning of licenses to provide teletext, data, paging, and other communications services on the television vertical blanking interval ("VBI") and FM subcarrier frequencies.

INTRODUCTION

Interactive Communications Partners ("ICP") is a general partnership formed for the purpose of providing video, data, and other communications services to the public. ICP believes that the amendments to the Communications Act of 1934 (the "Act") contained in the Omnibus Budget Reconciliation Act of 1993 make it appropriate for the Commission to grant new licenses for the VBI and FM subcarrier frequencies using the auction process. A change in the Commission's licensing rules for VBI and FM subcarrier operations is necessary in any case because the current rules unlawfully cede the Commission's licensing powers to private parties. By reasserting its statutory licensing role and adopting auctions, the Commission will ensure that the valuable spectrum

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resource represented by the VBI and FM subcarrier frequencies are fully exploited in the public interest.

I. THE AUCTION PROCESS SHOULD BE APPLIED TO THE AWARDING OF LICENSES FOR USING THE VBI AND THE FM SUBCARRIER FREQUENCIES

New Section 309(j) of the Act provides the Commission with the authority to use competitive bidding as follows:

(2) **USES TO WHICH BIDDING MAY APPLY.**---A use of the electromagnetic spectrum is described in this paragraph if the Commission determines that---

(A) the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee ---

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or

(ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate; and

(B) a system of competitive bidding will promote the objectives described in paragraph (3).

(3) **DESIGN OF SYSTEMS OF COMPETITIVE BIDDING.**---For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. In identifying classes of licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 1 of this Act and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of the electromagnetic spectrum.

Awarding licenses for use of the VBI and FM subcarrier bands meets each of the Act's specifications for using auctions.

A. The Services Provided Using The VBI Or FM Subcarrier Frequencies Involve Or Are Reasonably Likely To Involve Payment Of Compensation

Unlike broadcast services, which are provided free to the public, virtually all services currently provided using the VBI or FM subcarrier frequencies involve payments by subscribers for the ability to receive those services or to transmit on those frequencies. This fact applies to "video" services such as teletext and interactive video, just as it does to ordinary common carrier services such as paging.¹ Accordingly, the services provided using the VBI or FM subcarrier frequencies qualify under the "involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers" requirement of Section 309(j)(2)(A) for the use of auctions.

B. The Use Of Auctions Would Promote Each Of The Objectives That Section 309(j)(3) Of The Act Addresses

Despite having been available for non-broadcast applications for nearly a decade, the VBI and FM subcarrier bands remain an under-utilized resource. Given the overwhelming enthusiasm with which the public has responded to the availability of small allocations of frequency for use in providing similar services over bands located in the

¹ For example, Interactive Network, Inc. uses the VBI in connection with its interactive television services. Interactive Network charges its subscribers fee for receiving and participating in its services. Paging services, such as that operated by Cue on FM subcarrier frequencies, also require payments from subscribers.

same ranges of frequencies,² it is plain that the Commission's current rules are deterring the full use of these valuable spectrum resources.

1. Auctions Would Speed the Deployment of Valuable Communications Services Using the VBI and FM Subcarrier Frequencies

A major difficulty with the Commission's current rules is that anyone who wants to use the VBI or FM subcarrier frequencies must pay a broadcaster enough to persuade the broadcaster to sublicense the proposed operations. A prosperous broadcaster could decide that an offer approximating the market value of that spectrum was not enough to make such an arrangement attractive to it. Accordingly, the Commission's rules saddle the entrepreneur who wants to offer services using the VBI or FM subcarrier frequencies with meeting needs and demands of broadcasters that are unrelated to the usefulness to the public of the services that the entrepreneur could offer or the fair market value of the frequency that would be used.

By taking licensing decisions away from broadcasters, auctions would speed the deployment of VBI and FM subcarrier services. The public would benefit by having the ability to utilize communications services made available by these means. The growth of such services would be determined by the public's demand for them, rather than by the narrow financial concerns of broadcast licensees.

2. Auctions Would Promote Economic Opportunity and Competition

Under the existing rules, persons who desire to use the VBI or FM subcarrier

² For example, the Commission received some 55,000 applications for the local and national authorizations for the 220 MHz narrowband services. The Commission also received approximately 5,000 applications for the interactive video and data services ("IVDS") licenses for nine cities, despite charging an application filing fee of \$1,400. Both the 220 MHz narrowband services and the IVDS frequencies are situated near broadcasting frequencies.

frequencies must negotiate with broadcast licensees. Because the Commission does not set standards under which broadcast licensees must make these frequencies available, broadcast licensees can discriminate against new entrepreneurial businesses, or against businesses that are owned by minorities or women.³ The broadcast licensee can justify its refusal by claiming that it prefers not to undertake any such relationship. Later, it can easily change its mind if approached by a company of a kind that it prefers to deal with, claiming that a change in conditions (e.g., need for additional revenues, greater understanding of the technology, etc.) was the basis for its change in position.

By utilizing auctions, the Commission would create greater economic opportunity with respect to the VBI and FM subcarrier frequencies, opening the licensing process to all who desired to participate. The kinds of artificial barriers to participation that are possible with the current rules would disappear.

3. Auctions Would Allow the Public to Recover a Portion of the Value of the Spectrum

It would be difficult to imagine a more appropriate situation for the use of auctions than in the licensing of the VBI and FM subcarrier frequencies. One of the principal reasons that Congress authorized auctions of radio spectrum was to ensure that the public received some value for the valuable resource it was licensing, rather than giving that resource to the licensee for free.

The Commission's current rules for the licensing of VBI and FM subcarrier operations provide for broadcast licensees, not the public, to receive the value of the radio spectrum, resource. The current rules give broadcast licensees that do not want to use a portion of the spectrum allocated to them for broadcast activities the ability to profitable

³ Recently released figures give the number of minority-owned broadcast stations in the United States as 2.7% of the total.

sale of the rights to use that spectrum. In effect, the rules treat the broadcast licensees as the owners of radio spectrum, not as public trustees.

If the Commission awarded licenses for the VBI and FM subcarrier frequencies using auctions, the public, rather than broadcast licensees, would receive the value of those frequencies. While broadcast licensee might complain about the loss of potential revenues, such complaints would have no merit. The Commission grants broadcast licensees the right to use the radio spectrum -- a valuable public resource -- for providing broadcast services. The Commission does not, and indeed cannot, give broadcast licensees ownership rights with respect to the frequencies they use.⁴ Broadcast licensees are no more entitled to receive revenues from a secondary use of the frequencies for which they are the primary users than any other Commission licensee would be.

By implementing auctions for the VBI and FM subcarrier frequencies, the Commission would satisfy the Act's goal of having the public recover part of the value of the public spectrum resource that such licensees use.

4. Auctions Would Ensure The Efficient and Intensive Use of Electromagnetic Spectrum

In contrast with the current system, under which broadcast licensees apply criteria which may be wholly unrelated to the efficient use of radio spectrum in deciding who is allowed to use the VBI and FM subcarrier frequencies, auctions would be a highly efficient means of allocating such rights. Through competitive bidding, the potential operator who set the highest value on the spectrum would win the right to use it.

⁴ See, e.g., Section 304 of the Act, 47 U.S.C. §304.

II. INITIATION OF A RULEMAKING FOR AUCTION OF THE VBI AND FM SUBCARRIER FREQUENCIES WOULD BE CONSISTENT WITH OTHER ACTIONS THAT THE COMMISSION HAS TAKEN IN RESPONSE TO SECTION 309(j) OF THE ACT

Initiating a rulemaking to implement auctions for the VBI and FM subcarrier frequencies would be consistent with other actions that the Commission and its staff have taken to implement Section 309(j) of the Act.⁵ For example, the Commission recently began a review of its pioneer preference rules to determine if they were consistent with the new statutory provision or whether they should be modified or eliminated in light of auctions. See Report No. DC-2520, ET Docket 93-266, released October 21, 1993.

Similarly, the Common Carrier Bureau decided to delay the lotteries it had scheduled for September 22, 1993 for cellular unserved areas in order to consider whether to award such licenses by auction. See Lottery Notice (Mimeo No. 34917), released September 16, 1993.

III. THE CURRENT RULES' DELEGATION OF LICENSING AUTHORITY FOR THE VBI AND FM SUBCARRIER FREQUENCIES TO BROADCAST LICENSEES VIOLATES THE ACT

Section 307 of the Act authorizes the Commission to grant a radio license if such grant will serve the public convenience, interest or necessity. 47 U.S.C. §307. The Act does not provide for the Commission to cede its statutory licensing powers to private parties.

Nevertheless, the effect of the Commission's current rules is to shift the licensing powers for the VBI and FM subcarrier frequencies to broadcast licensees. The broadcast licensees decide whether the grant of such authorizations will serve their own

⁵ ICP takes no position on the merits of any of the actions being considered by the Commission. It believes, however, that the fact that the Commission has taken such action to re-evaluate existing rules for awarding licenses in the context of the auction authority granted by new Section 309(j) is of great significance.

convenience, interest and necessity. The public interest is not considered at all.

The Commission's only role in the licensing process for the VBI and FM subcarrier frequencies is to rubber-stamp the broadcast licensee's action.⁶ This role is not sufficient to fulfill the Commission's licensing duties under the Act.

IV. ICP'S PROPOSED RULE CHANGES

ICP proposes that the Commission implement a system of competitive bidding for the licensing of operations of the VBI and FM subcarrier frequencies. Any person qualified to serve as a licensee for the services that it proposes to provide could apply,⁷ specifying the particular frequencies and facilities it would use. The Commission would put the application on public notice. If no one files a mutually exclusive application within 30 days of the public notice, then the Commission would consider the application on its merits and grant the application if it serves the public interest. The Commission would also accept petitions to deny the application and consider them if no one filed a mutually exclusive application.

If one or more mutually exclusive applications were filed, then the Commission would schedule an auction date. Only those who have filed timely applications would be

⁶ The Commission does not even review agreements for use of the VBI or FM subcarrier frequencies before they are implemented. See Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, 57 R.R.2d 832, 835-36 (1985) (the "Order"). The Commission's assertion in the Order that the use of the VBI is a "secondary privilege that runs with the broadcast television license" id., 835, would make sense if the broadcast licensee was to provide the service itself. However, the Order expressly authorizes broadcast licensees to engage in "franchise/lease arrangements with third parties for use of the VBI." Id., 836.

⁷ The services currently offered vary from private radio services to common carrier services. ICP does not propose to change the kinds of services permitted. However, in its initial application, the applicant would specify the services it intends to offer and demonstrate that it meets the Commission's licensing requirements for such services.

permitted to participate in the auction.

After the auction proceeding was completed, the Commission would put the application of the highest bidder on public notice and accept petitions to deny the application pursuant to Section 309(d) of the Act.⁸ After the close of the public notice period, the Commission would consider the merits of the application of the highest bidder and grant the application if it finds that the application would serve the public interest.

Broadcasters whose licensed frequencies would be affected could file petitions to deny the VBI and FM subcarrier applications. However, the Commission should find in the rulemaking that such services are in the public interest and that broadcasters shall not be permitted to protest such applications on the basis that such services require use of the broadcaster's facilities. The rules should require broadcasters to make their facilities available to VBI and FM subcarrier licensees, just as the Commission has begun proceedings to require local exchange carriers to provide co-location of facilities for interconnection. Broadcasters should receive compensation for such co-location, based on a formula specified in the new rules.

In order to prevent any anticipatory circumvention of the new auction rules, the Commission should specify that auctions shall apply to any new VBI or FM subcarrier facilities not in operation as of the date of filing of this Petition for Rulemaking. Where there are executory contracts already in place, the contracts shall be null and void with respect to licensing VBI or FM subcarrier operations.

⁸ If the original filer were also the highest bidder, it would be subject to submissions of petitions to deny for a second time. However, because the Commission would not consider any petitions until it knew who was the highest bidder, there would be no increase in the Commission's administrative burden.

CONCLUSION

The Commission will foster the rapid development and implementation of valuable communications services on the VBI and FM subcarrier frequencies by changing its rules to implement licensing through auctions. Such rule changes will also help to reduce the national debt and eliminate a licensing scheme that is unlawful under the Act.

Respectfully submitted,

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